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***Payne v. Tennessee*: VICTIM IMPACT EVIDENCE IS CONSTITUTIONALLY PERMISSIBLE IN THE SENTENCING PHASE OF A CAPITAL TRIAL.**

In *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the United States Supreme Court held that victim impact evidence in a capital sentencing proceeding is not per se barred by the Eighth Amendment. In an opinion delivered by Chief Justice Rehnquist, the Court held that evidence of the victim's personal characteristics and the emotional impact of the murder on the victim's family can be considered by the sentencing jury, as well as argued by the prosecutor at a capital sentencing hearing. In so holding, the Court overruled the recently established precedent of *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

Pervis Tyrone Payne was convicted by a jury of two counts of first degree murder and one count of assault with intent to commit murder. The murder victims were Charisse Christopher and her two year old daughter, Lacie. Her three year old son, Nicholas, survived the assault. Commenting in his closing argument as to the lasting effects of the murders on Nicholas, the prosecutor encouraged the jury to return a verdict that demonstrated justice was done. During the sentencing phase of the trial, the defendant presented mitigating evidence through testimony by his mother, father, girlfriend and a clinical psychologist. The state then offered the testimony of Charisse's mother, Mary Zvolanek, who testified as to how Nicholas had cried because he missed his mother and sister. The defendant was sentenced to death on each of the murder counts and 30

years imprisonment for the assault count.

Rejecting Payne's contention that the admission of victim impact evidence constituted prejudicial violations of his Eighth Amendment rights as interpreted in *Booth* and *Gathers*, the Supreme Court of Tennessee affirmed the trial court's holding. *Payne*, 111 S. Ct. at 2603-04. The court found that even if Payne's rights were violated under *Booth* and *Gathers*, the violation "was harmless beyond a reasonable doubt." *Id.* (quoting *State v. Payne*, 791 S.W.2d 10, 18 (Tenn. 1990)).

The Supreme Court granted certiorari specifically to reconsider the holdings in *Booth* and *Gathers* and first reviewed the premises relied upon in both of these decisions. The Court specifically considered the premises that victim impact evidence "does not reflect on the defendant's blameworthiness," and that "only evidence addressing the defendant's blameworthiness is relevant to the capital sentencing decision." *Id.* at 2605. Concluding that the *Booth* Court misread the established precedent in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), that "a capital defendant must be treated as a uniquely individual human being," the Court stated that such misreading unfairly weighted the scales in a capital trial. *Payne*, 111 S. Ct. at 2607. The Court stressed that while a capital defendant may present virtually unlimited "relevant mitigating evidence," the state is prohibited from presenting evidence that would show "a glimpse of the [victim's] life, or that would demonstrate 'the loss to the victim's family and to society.'" *Id.*

The Court, therefore, found that *Booth* deprived the state of the "full moral force of its evidence" and could prevent the jury from evaluat-

ing "all the information necessary for a first degree murder sentencing." *Id.* at 2608. Similarly, *Gathers* barred prosecutors from presenting victim impact evidence to the sentencing jury. *Id.* at 2609. The Court further emphasized that victim impact evidence is offered to show "each victim's uniqueness as an individual human being" and not to encourage comparative judgments of victims. *Id.* at 2607. The Court maintained that should evidence be introduced "that is so unduly prejudicial, . . . the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 2608. In overruling these decisions, the Court reasoned that mitigating evidence presented by the defendant and victim impact evidence introduced by the state are now on equal ground - they are both relevant and constitutionally permissible. *Id.* at 2609.

Finally, the petitioner argued that the Court should adhere to the doctrine of stare decisis and not overrule *Booth* and *Gathers*. *Id.* Acknowledging that stare decisis is a preferred policy, the Court concluded that it need not follow precedent when such governing decisions as *Booth* and *Gathers* "are unworkable or badly reasoned." *Id.* In a concurring opinion, Justice Scalia pointed out that the doctrine is a reflection of the principal that "the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Id.* at 2614, (Scalia, J., concurring). Justice Scalia suggested it was *Booth*, and not *Payne* that compromised the doctrines' fundamental values. *Id.*

Justice Marshall, joined by Justice Blackmun, filed a powerful dissent criticizing the majority of exercising power, not reason, in its decisionmaking. *Id.* at 2619

(Marshall, J., dissenting). Noting that the only change in the four year interim between the decisions in *Booth* and *Gathers* and *Payne* was the personnel of the Court, Marshall maintained that the real inquiry should be whether the majority satisfied the extraordinary showing of special justification required before overruling Court precedent. *Id.* at 2619-21.

Justice Stevens' dissent, joined by Justice Blackmun, emphasized that our capital punishment jurisprudence has allowed the sentencing jury to consider only mitigating evidence concerning the offense and the character of the defendant. *Id.* at 2626-27 (Stevens, J., dissenting). Justice Stevens asserted that evidence which served no purpose other than appealing to the "sympathies or emotions of the jurors has never been considered admissible." *Id.* at 2626. The dissent accused the majority of abandoning the "rules of relevance that are older than the Nation itself." *Id.* at 2627.

With this decision, the Supreme Court has overruled recently decided cases and disregarded precedent by holding victim impact evidence constitutionally permissible. A state may now allow a sentencing jury to consider victim impact evidence, and a prosecutor may argue victim impact to the sentencing jury. The Court's broad interpretation of "relevant evidence" will have far reaching implications for capital defendants, the families of their victims, and to society as a whole.

- Belinda P. Gardner

***Rust v. Sullivan*: SUPREME COURT UPHOLDS AGENCY REGULATIONS PROHIBITING THE COUNSELING, REFERRAL OR PROVISION OF INFORMATION CONCERNING ABORTION AS A METHOD OF FAMILY PLANNING.**

In a five to four decision, the Supreme Court in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), upheld regulations of the Public Health Services Act requiring recipients of Title X funds to refrain from engaging in abortion counseling, referral, and provision of information concerning abortion as a method of family planning. The Court gave extreme deference to the Department of Health and Human Services and upheld the regulations on the ground of statutory construction. In addition, the Court found the regulations were not violative of the First or Fifth Amendments.

Title X of the Public Health Service Act, 84 Stat. 1506 (1970) (current version at 42 U.S.C. §§ 300 to 300a-6), was originally enacted by Congress in 1970 to provide federal funding for family-planning services. *Rust*, 111 S. Ct. at 1764. The Act authorized the Secretary of Health and Human Services (the Secretary) to provide funding to public or nonprofit private entities to operate family planning projects. The Secretary was also authorized to promulgate such regulations as deemed necessary to carry out the intent of the statute. *Id.* (citing 42 U.S.C. §§ 300(a), 300a-4 (1970)). Section 1008 of the Act provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Rust*, 111 S. Ct. at 1764-65 (citing 42 U.S.C. § 300a-6 (1970)).

In 1988, after determining that

current regulations failed to properly implement the statute, the Secretary promulgated new regulations designed to provide "clear and operational guidance to grantees [of Title X funds] to preserve the distinction between Title X programs and abortion as a method of family planning." *Rust*, 111 S. Ct. at 1765 (quoting 53 Fed. Reg. 2923-24 (1988)). Specifically, the regulations attached three conditions for receipt of the funds. First, the "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Rust*, 111 S. Ct. at 1765 (quoting 42 C.F.R. § 59.8(a)(1)). Second, recipients of Title X funds may not engage in activities that "encourage, promote or advocate abortion as a method of family planning." *Id.* (quoting 42 C.F.R. § 59.10(a) (1989)). Third, the Title X project must be "physically and financially separate" from any prohibited activity so that an "objective integrity and independence from prohibited activities" remains. *Rust*, 111 S. Ct. at 1765 (quoting 42 C.F.R. § 59.9 (1989)).

The petitioners in this action were grantees of Title X funds suing on behalf of themselves and their patients. The petitioners challenged the facial validity of the new regulations on grounds that they were not authorized by Title X and violated the First and Fifth Amendment rights of Title X patients and the First Amendment rights of Title X health care providers. The District Court for the Southern District of New York granted summary judgment in favor of the Secretary. Both the Court of Appeals for the Second Circuit and the Supreme Court affirmed the lower court's decision.

In its analysis, the Supreme Court first addressed the Secretary's au-